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In the Supreme Court of the United States

No. _____ 71-972

OCTOBER TERM, 1971

VIRGIL E. COCHRAN,

Petitioner,

vs.

ROBERT G. COSTILL, et al.,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO, THE COURT OF APPEALS FOR THE NINTH JUDICIAL DISTRICT FOR SUMMIT COUNTY, OHIO AND TO THE COURT OF COMMON PLEAS OF SUMMIT COUNTY, OHIO

VIRGIL E. COCHRAN
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In Proria Persona

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Petitioner prays that writs of Certiorari issue to the Ohio Supreme Court Case No. 71—395, to the Court of Appeals Ninth Judicial District of Ohio Case No. 6662 and to the court of Common Pleas of Summit County, Ohio Case No. 265187 for this court to review their final orders and judgments.

CITATIONS TO OPINIONS BELOW

A finding under date of September 28, 1970 of the court of Common Pleas has not been officially reported. It is printed in Appendix A, *infra*, P. 31.

The Judgment Entry of the Common Pleas Court under date of October 5, 1970 that followed the above finding is printed in Appendix A, *infra*, P. 32.

Journal Entry under date of April 11, 1969 of the Common Pleas Court of Summit County, Ohio is printed in

Appendix A, *infra*, P. 31 .

An Opinion under date of April 21, 1971 of the Court of Appeals has not been officially printed. It is presented in Appendix A, *infra*, P. 34 .

The Judgment under date of May 4, 1971 of the Court of Appeals resulting from the Opinion referred to immediately above is printed in Appendix A, *infra*, P. 37 .

The Order of the Supreme Court of Ohio Dated September 22, 1971, overruling petitioner's motion to certify the record of the Court of Appeals is presented in Appendix A. *infra* P. 38 .

The order by the Supreme Court of Ohio dated September 22, 1971 dismissing Petitioner's appeal as of right from the Court of Appeals is presented in Appendix A, *infra* P. 38 .

The Order of the Supreme Court of the State of Ohio under date of November 3, 1971, denying petitioner's motion for rehearing is presented in Appendix A, *infra*, P. 38 .

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was entered on September 22, 1971, Appendix A, *infra*, P. 38 .

The Supreme Court of Ohio on November 3, 1971 denied petitioner's motion for rehearing, Appendix A, *infra* P. 38 .

The jurisdiction of this court is invoked under section 28 U.S.C.A section 1257 (3), Rule 19 of the Supreme Court of the United States. Columbia— v. Columbia—178 U.S. 475, 431.e.d. 521, 19 ser. 247, aff'g 43 sc 154, 20 se 1002.

Article III Section 2 of the Constitution of the United States "The judicial powers shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, *** to controyersies between citizens of the same state"***.

QUESTIONS PRESENTED FOR REVIEW

1. Has the petitioner been unlawfully deprived of his proper day in court and his right to trial by Jury because of erroneous actions taken by the lower courts upon themselves in considering this case a proper one for the rendering of a summary judgment in; in favor of respondents?;

2. Were the respondents entitled to a summary judgment in this case, based solely upon the pleading as is required by law, in order for a court to render a summary judgment in?;

3. Was this case a proper one for summary judgment to have been rendered in when there was nothing pleaded by either party that was not duly disputed by the other party throughout the trial court?;

4. Did the Trial Court have jurisdiction to direct attorney for respondents on March 20, 1969 the day this case reached the court for trial; to file their motion for summary judgment R.P.8.?;

5. Did the Trial Court have jurisdiction on March 20, 1969 to refuse as it did, to proceed with a jury trial of this case after it had been duly set and had reached the court for trial?;

6. Did the Trial Court have jurisdiction, to act as it did on March 20, 1969 in issuing a verbal directive of court to respondents' counsel to file a motion on April 4, 1969 for summary judgment; after the case reached the court for trial R.P.8?;

7. Is it possible that a Common Pleas court judge does not know as he pretended not to know that the 11th. day of April, 1969 came before the 14th. day of April, 1969 R.P.9?;

8. Was not the trial court obligated by law and for lack of jurisdiction, to sustain and not overrule as it did on R.P. 13 petitioner's motion of April 24, 1969 to strike the journal entry of April 11, 1969 that granted leave to respondents to file their motion for summary judgment, and to strike the affidavit of Attorney Mueller in support of the motion as not being timely filed, since the case had been duly set for trial on March 20, 1969 and reset for trial on April 14, 1969 R.P. 10, 11.?;

9. After reading record page 3,4,5,6,7,8, and 9 how can it be said that this case was not set for trial and then unlawfully

continued until April 14, 1969 in order to give counsel for respondents an opportunity to file their motion for summary judgment; which was contrary to law?;

10. Did the trial court have jurisdiction, to apply, as it did ex post facto rule 12 (C) of the new Ohio rules of civil procedure in the finding made in this case?;

11. Did the trial court have jurisdiction, on March 20, 1969, the day this case reached the court for trial after being regularly set; to grant respondents leave to file a motion for summary judgment as it did?;

12. Did not respondents by their answer raise new matter namely res judicata and did not petitioner, in his reply, deny res judicata; then was not the court required by law, which it did not do, to find that there were genuine issues of material facts presented by the pleadings for a trial by jury?;

13. Could the trial court lawfully as it did sustain the sham motion of respondents for summary judgment where they claimed res judicata based on another case where they did not file with their motion or in the case at bar; the case folder or at least a copy of the petition of the case they claimed to be res judicata?;

14. Did respondents prove res judicata in this case by filing a docket transcript of another case where the docket transcript did not show that the causes of actions in both cases were for the same cause?;

15. Is not the judge in passing on a motion for summary judgment restricted to considering only what the summary judgment statute of his state specifies that he can consider on the hearing of the motion and was the summary judgment rendered in this case solely on matters that the court was by statute prohibited from considering?;

16. Are not all of the proceedings of the lower courts contrary to law and in violation of the petitioner's state and federal constitutional rights?;

17. Is not the opinion of the Court of Appeals completely dicta for the reason that the court, in writing said opinion, based it solely on cases other than this within case and on cases that were not filed in this case?;

18. What relavancy do all the cases that the court of

appeals dug up that were never filed in this case, and based their purported opinion on as they did in this case; have to do with this case when the court is strictly restricted on review to consider what the trial court had before it and did or should have considered?;

19. Do not the opinion and judgment of the Court of Appeals in the case at bar conflict with opinions and judgments of other courts of appeals pronounced upon the same question?;

20. Was not the Court of Appeals obligated by both the U.S. and the State of Ohio Constitutions to sustain instead of overruling petitioner's motion to certify its records to the Supreme Court of Ohio for clarification of conflict in its judgment in the case at bar and that pronounced upon the same question by other courts of appeals of the state of Ohio?;

21. Was not the Court of Appeals as well as the state supreme court of Ohio required by law, the constitutions of both the United States and the state of Ohio to reverse the trial court in the case at bar?.

CONSTITUTIONAL PROVISIONS

The United States Constitutional provisions that are involved and that were raised in the pleadings in the Common Pleas Court, by the first assignment of error to the Court of Appeals and on pages 27, 28 and 29 of the memorandum in support of jurisdiction in the Supreme Court of the State of Ohio are as follows to wit:

(A) Amendment IV. "The right of the people to be secure in their person, houses, papers, and effects"***; Under this amendment, petitioner's right to be secure in his papers and effects has been violated for the reason that the action taken by the lower courts has rendered his contract papers and his effects thereof useless and he is no longer safe therein.

(B) Amendment VII. "In suits at common law, where the value in controvercy shall exceed twenty dollars, the right to trial by jury shall be preserved",*** Under this amendment, petitioner's right to a jury trial was violated for the reason that the amount in controvercy exceeded twenty dollars by far.

Petitioner requested a jury trial and the trial court refused to grant a jury trial.

(C) Amendment VIII. "Excessive bail shall not be required, nor cruel and unusual punishments inflicted", *** Under this amendment, petitioner has had a great deal of cruel and unusual punishment inflicted upon him for the reason that the lower courts have been negligent in not performing their duty as normal courts do and in not seeing that petitioner's rights were protected by law to have his contract enforced: thereby causing him a great deal of physical and mental punishment by refusing him his rights to his contractual funds.

(D) Amendment XIII. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction", *** Under this amendment, petitioner's rights have been violated for the reason that he committed no nor was he convicted of any crime in slaving for the respondents, in completing what is known in the field of home construction as the roughin or the rough work that the lawful contract that is in question here provided for; then the lower courts have subjected him to and enforced involuntary servitude upon him by their acts in not requiring the respondents to perform on their part and pay the $1,500. as the contract provided for.

(E) Amendment XIV, Section I. "All persons born or naturalized in the United States, and subjects of the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunity of citizens of the United States; Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws", Under this Amendment, petitioner's rights were violated for the reason that his privilege and immunity was abridged by the acts of the lower courts unlawfully enforcing a summary judgment statute law section 2311.041 of the Revised Code of Ohio that was inoperative in this case since there were genuine issues of material facts shown by the pleadings that prevented

summary judgment from being rendered for respondents as it was; to wit: the answer presented new matter and the reply denied the new matter alleged in the answer.

Petitioner's rights were further violated by the lower courts taking away from him his liberty to enforce his contract by a jury trial.

The contract in question here was and is petitioner's property and the lower courts have taken its value from petitioner and have given its value to respondents without due process of law.

(F) Article I, Section 10, claus 1 "No state shall *** pass any *** law imparing the obligation of contracts ***. Under this section, petitioner's rights were violated for the reason that his right and his day in court to enforce the provision of his contract that the respondents pay him as they agreed have been impaired and denied to him by the unlawful interpretation of the summary judgment statute of the Revised Code of Ohio Section 2311.041, by the Courts.

(G) Article I, Section 10, claus I and Article I, Section 9 "No state shall *** pass any *** Ex Post Facto law," Under this section, petitioner's rights were violated for the reason that on July 1, 1970 the Ohio Rules of Civil Procedure went into effect which was a year and five months after the motion for summary judgment and the motion to strike it was argued to the court, the court made a finding wherein it applied Ex Post Facto 12(C) of said rules and found *** "that the said Rule 12(C) went into effect July 1, 1970, that the said Civil Rule 12(C) takes priority over the statute."***; when in fact said Civil Rule 12(C) does not in any way deal with summary judgments, but instead it deals with motion for judgment on the pleadings.

(H) Article 6, Claus 2. "This Constitution, and the laws of the United States which shall be made in pursuance thereof;*** shall be the Supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Under this Article, petitioner's rights to his day in court, trial by a jury, the benefits afforded him by law and the benefits of getting his contractual funds have been violated for the reason that the courts refused to be, or to

bound themselves to the constitution and the laws which were made in pursuance thereto.

(I) Article 6, Claus 3, "All *** Judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution;" *** Under this Article, petitioner's rights were violated for the reason that the lower courts did not support the Constitution as they were obligated to do in that they did not enforce the well settled law provided for by the Constitution.

(J) Amendment V *** "Nor shall any person be *** deprived of life, liberty, or property, without due process of law;" *** Under this section, petitioner's rights were violated for the reason that he was denied due process of law; by the court's wrongfully applying the summary judgment statute to this case when in fact it was inoperative in that there were a number of disputed issues of material facts involved.

OHIO CONSTITUTIONAL PROVISIONS

The state of Ohio constitutional questions that are involved and were raised by pleadings in the Common Pleas Court, by the first assignment of error to the Court of Appeals and on pages 27, 28 and 29 of the memorandum in support of jurisdiction in the appeal to the Ohio State Supreme Court in this case are to wit:

Article I, Section 16: All courts shall be open, and every person, for any injury done him in his land, goods, person or reputation shall have remedy, by the court of law, and shall have justice administered without denial or delay, suits may be brought against the State, in such courts and in such manner, as is provided for by law. Petitioner was denied his remedy by the courts in that they denied him his day in court and a jury trial.

STATEMENT OF THE CASE

Petitioner and respondents on July 12, 1962 entered into a written divisible contract whereby petitioner would supply labor and material necessary to build a two (2) room addition onto respondents' home for the sum of $3,000. The contract provided that respondents would pay one half of the contract price ($1,500.00) to petitioner when the roughin portion of the work was completed, and the balance of the contract price ($1,500.00) when the finish portion of the work was completed.

Petitioner performed on his part and completed the roughin part of the addition that the first portion of the contract provided for. Then respondents did and have ever since refused to pay to petitioner $1,500.00 as agreed.

On November 24, 1962, petitioner sued respondents in form of ex delicto in Akron Municipal Court Case No. 396399 for the first portion of the contract and on July 24, 1964 the case was dismissed by the court without prejudice.

On April 29, 1966, petitioner sued again in the Akron Municipal Court Case No. 433879 to vacate the aforesaid order of dismissal and to reinstate the dismissed Case No. 396399; in the same petition that is in Case No. 433879. Petitioner also sought damages from respondents and their attorney, *Joseph P. Mueller*: that he alleged occurred in the year of 1964.

Case No. 433879 was not contested other than 3 months after the respondents were in default for answer; without leave of court they filed the following motion, on July 29, 1966:

"Comes now the Defendants, by and through their attorney, and move the Court to strike the two (2) Journal Entries filed on the 18th day of July, 1966, for the following reason:

Plaintiff and Defendants herein had agreed to submit their respective entries, over-ruling the Motion and Supplemental Motion of the Plaintiff, to the Court for the Courts consideration, and in the event that the Court approved neigher of said entries, the Court would then file its own entry; that the Court being unaware of said agreement, signed said entries at different times, although said entries were filed for record on the same day.

The Defendants further move the Court and respectfully moves that Case No. 433879, Municipal Court of Akron be consolidated with the prior case referred to as being Case No. 396399, Akron Municipal Court, and the entire matter be submitted to the original Court for hearing said Case No. 396399, Akron Municipal Court."

This motion was dismissed on February 23, 1967, and as a result of the court over-ruling petitioner's motion for a default judgment; an appeal was taken on July 29, 1966, to the Court of Appeals of Summit County, Ohio Case No. 6158: and as a result of the appellate court dismissing the appeal and stating that it was remanding the matter back to the trial court; on January 17, 1967, a notice of appeal was timely filed to the Supreme Court of Ohio Case No. 40756 for an order for the Court of Appeals to certify its records to that court. The motion to certify was denied, but while the motion to certify was pending, attorney for respondents did voluntarily pay the money damage sought in Case No. 433879, on February 23, 1967 by purporting to render a judgment in Akron Municipal Court against respondents as on default for the alleged money damage only that occurred in 1964, but the purported judgment did not reinstate Case No. 396399 that was based on the written contract of 1962 nor has there been any further action taken on the cause of action that was dismissed wi'out prejudice in Case No. 396399 other than the Common Pleas Court Case No. 265187 which is the case at bar, which was filed on August 4, 1967, based solely upon a written contract between the same parties but for a different cause of action than was Case No. 433879 that occurred in 1964 even though the same parties are involved. The causes of actions are for different things therefore are not res judicata to each other.

The lower courts cannot substitute the aforesaid cases for the cause of action in the case at bar.

On August 4, 1967, petitioner, after his attempts to collect in the Akron Municipal Court were unsuccessful on the written contract of on July 12, 1962, brought this within action on the contract dated July 12, 1962. Petitioner alleged he had supplied all material and labor necessary to complete the erection and

construction of the first portion of the contract. The respondents on August 10, 1967, demurred on grounds that "there is another action pending between the same parties for the same cause: said action having been filed in the Common Pleas Court, Summit County, Ohio, being styled Case No. 261953." This demurrer was overruled on October 10, 1967; on November 30, 1967, respondents answer admitting the allegations of the petition and that they had received the roughin addition onto their home they alleged res judicata in the Common Pleas Court Case No. 261953 which case was for the finish or second portion of the contract of July 12, 1962. They also allege res judicata in the Akron Municipal Court Case No. 433879, which is for causes of actions other than this within Case No. 265187. Petitioner's reply on December 22, 1967, to the answer denied res judicata existed and denied the cause of action in this case was the same as that in Case No. 433879 and case no. 261953.

After the issues were made up for over one year, petitioner on December 4, 1968, with notice to respondents' attorney, filed written request for trial. Trial date was set for March 20, 1969, as per copy of the trial notice in the appendix; the court refused to proceed with the trial as it was set for on March 20, 1969; but instead, continued the trial until April 14, 1969, in order to give counsel for respondents an opportunity to file their motion for summary judgment, as they admit R.P. 10, 11,12 and 13.

On April 11, 1969, said Common Pleas Court approved the following Journal Entry in this case:

> "on oral motion of the defendants and each of them, and so that they can comply with a prior verbal directive of this court; the court being fully advised in the premises, the defendants and each of them are hereby granted leave to file their motion for summary judgment in the within matter instanter."

Petitioner objected to the court granting leave to file the motion for summary judgment on grounds that the court was without jurisdiction to grant such leave after the case had been set for trial on March 20, 1969, and reset for trial on April 14, 1969. On April 24, 1969, petitioner filed a written motion "to

strike the journal entry of April 11, 1969, giving leave to file the motion for summary judgment, to strike the motion of respondents for summary judgment and to strike the affidavit of *Attorney Mueller* in support thereof; this motion was overruled R.P. 13; On April 24, 1969, petitioner filed his affidavit in opposition to the motion for summary judgment on April 25, 1969, record page 17. The court took same under advisement and a year and five months later, on September 28, 1970, made a written finding for summary judgment for respondents. In the meantime, on July 1, 1970, the new Ohio rules of Civil Procedure went into effect. The court based its finding in chief on rule 12(C) and made it ex post facto; instead of on the law as it was some 17 months prior at the time the matter was submitted to the court:

Eventhough respondents did not file the folder or a copy of the petition of the case they claimed to be res judicata in; they only filed a transcript of the court docket in case no. 433879: in support of their motion for summary judgment, but the transcript showed only that a judgment had purportedly been rendered at a time when the court was without jurisdiction to make further orders in the case and did not show that the causes of actions in case no. 433879 were for the same cause of action as the case at bar. An appeal was taken to the Court of Appeals from the order rendering summary judgment in favor of respondents.

On April 21, 1971, the court of appeals made an erroneous finding based completely on other causes that it had had before it some two years before and that had no relevancy to this within matter that was properly before the court. This erroneous finding was journalized on May 4, 1971. To which an appeal was taken to the Supreme Court of Ohio for the court of appeals to certi y its records as a result of errors committed by the appellate court in its opinion of on April 24, 1971. Said opinion is based solely upon actions that were not before the court in this instant matter and on actions that are not a part of or have any bearing on this instant matter and on cases that were not filed in this action.

Said opinion refers entirely to cases that have been dismissed without prejudice and are therefore nothing more

than dicta conversation by the court and to their opinion of about two years prior in case no. 6163 that has no bearing on this instant matter, and to the finding of the Common Pleas Court which was based solely upon the Appellate court's opinion in Case No. 6163 of some two years prior and has no bearing on the instant matter. It is apparent that the court did not consider the eleven briefed assignments of error other than to see that the last one was No. II in this case.

STATUTES OF THE OHIO REVISED CODE THAT ARE INVOLVED ARE TO WIT:

1901.30 (1609). Appeals.

(D) When an appeal has been determined or dismissed by the reviewing court, the clerk of such court shall, immediately after the time allowed by law for the commencement of proceedings to appeal the judgment of said reviewing court, if such proceedings have not been commenced, transmit to the clerk of the municipal court all of the original papers and pleadings in the case, and issue its mandate to said clerk.

2305.06 (11221). Contract in writing.

Except as provided in section 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued. (129 v S 5. Eff. 7-1-62)

2309.36 (11338). Proving and pleading judgment.

In pleading a judgment, or other determination of a court, or of an officer of special jurisdiction, it is sufficient to state that such judgment or determination was given or made. If such allegation is controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction.

2311.02 (11377). Issues defined.

Issues arise on the pleadings where a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds:

(A) Issues of law;
(B) Issues of fact.

2311.03 (11378). Issue of fact.

An issue of facts arises:

(A) Upon a material allegation in the petition denied by the answer;

(B) Upon a counterclaim or new matter, presented in the answer and denied by the reply;

(C) Upon material new matter in the reply, which is to be considered as controverted by the adverse party without further pleading.

2311.04 (11379) (11380). Trial of issues.

Issues of law must be tried by the court, unless referred as provided in sections 2315.26 to 2315.36, inclusive, of the Revised Code. Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference is ordered as proveded in such sections.

All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury, or referred.

2311.041 Summary judgment.

Summary judgment may be granted in a civil action as provided in this section.

(A) A party seeking to recover upon a cause of action or counterclaim or to obtain a declatory judgment, or a party against whom a cause of action or counterclaim is asserted or a declaratory judgment is sought, may, at any time after the action is at issue, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. If the action has been set for pretrial, a party may file a motion for summary judgment only with leave of the court. After the action has been set for trial such a motion may only be filed with the consent of all the parties to the action.

(B) The hearing on a motion for summary judgment shall not be less than ten days after the date of the filing thereof. Notice of the filing and the date of the hearing of such motion

shall be given by certified or registered mail, or personally, to the opposing party or his counsel of record at least five days prior to the hearing, unless waived. The adverse party prior to the day of hearing may file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions of the genuineness of papers, or documents, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, previously filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this section. A summary judgment shall not be rendered unless it appears from the pleadings, depositions, answers to interrogatories, written admissions of the genuineness of papers or documents, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, previously filed in the action, and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made; the party against whom the motion for summary judgment is made is entitled to have such pleadings, depositions, answers to interrogatories, written admissions of the genuineness of papers or documents, affidavits, transscripts of evidence in the pending case, and written stipulations of fact construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(C) If on motion under this section summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings, depositions, answers to interrogatories, written admissions of the genuiness of papers or documents, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, previously filed in the action and only therefrom, before it, shall if practicable ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that

are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(D) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(E) Should it appear from the affidavits of a party opposing the motion for summary judgment that he cannot for sufficient reasons stated presented by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just. (131 v H 379. Eff. 11-5-65. 128 v 63)

2505.04 (12223-4). Appeal perfected.

An appeal is perfected when written notice of appeal if filed with the lower court, tribunal officer, or commission. Where leave to appeal must be first obtained, notice of appeal shall also be filed in the appellate court. After being perfected, no appeal shall be dismissed wihtout notice to the appellant, and no step required to be taken subsequent to the perfection of the appeal is jurisdictional.

NOTICE OF TRIAL

COUNTY OF SUMMIT
AKRON, OHIO

COURT OF COMMON PLEAS
JERRY POTTS
Assignment Commissioner
Summit County, Ohio

This is to notify you that Case No. 265187
Virgil Cochran vs. Robert Costill
is set for trial on Thursday, March 20, 1969

You will therefore be governed accordingly, as this case will be sent into court on this date at 9:00 A.M., unless a stipulation signed by the Presiding Judge and opposing Counsel is presented before 11:00 o'clock on the day previous.

This rule will apply absolutely.

Very truly yours,
Assignment Commissioner.

REASONS FOR GRANTING WRIT

There is great current and long range public interest in the powers and limitations of civil courts with respect to the determination of summary judgment disputes and particularly so with the case at bar involving a contract, since the welfare of the entire United States is dependent in some way upon contracts that effects all of the people, the revised code of Ohio and the case law thereunder.

The courts have enfringed upon petitioner's right to his day in court before a jury; the courts have in the case at bar stooped to a degree so low that if their absurd decisions are allowed to stand the right to jury trial in America involving contracts is in jeopardy of being lost and the very worst of the lower courts that might even be corrupt for their lawyer friends will continue to destroy the American system of judicial government; there have been wrongs knowingly committed against petitioner by the lower courts; now, how will they be corrected? Will it be by the sincere efforts of this, the highest

court of our land, to see that justice is done? Or will the petitioner be forced to resort to some other method of attempting to get justice?

Even though respondents did file in the case at bar a transcript of the docket in case no. 433879 that they claim is res judicata to the case at bar, said transcript of the docket did not show that a judgment had ever been rendered on the case at bar; for the reason that transcripts do not show in any respect any of the allegations of petitions of either case no. 433879 or the case at bar; the court therefore could not as a matter of law conclude that respondents were entitled to summary judgment for the reason that the summary judgment statute, revised code of Ohio section 2311.041 (B) reads ***

"No evidence or stipulation may be considered except as stated in this section. A summary judgment shall not be rendered unless it appears from the pleadings, depositions, answers to interrogatories, written admissions of the genuineness of papers or documents, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, previously filed in the action, and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made;" ***

In the case at bar, the trial court by the shabby treatment it extended to petitioner, the complete disregard for petitioner's rights to have his contract enforced by trial to a jury and the complete disregard for its oath of office to uphold the Constitution of the United States and of the state of Ohio, its complete disregard for the applicable law on summary judgment, and its going beyond the scope of its jurisdiction in rendering judgment for respondents was a complete departure from the accepted and usual course of judicial proceedings on summary judgment in Ohio for the reason that it did not follow the state of Ohio statute law applicable.

The ingredients required by the statute were not present to support the judgment rendered for respondents; revised code section 2311.041 allows the trial court

Judge, upon motion for summary judgment to consider only the following evidence

1. Pleadings.
2. Depositions.
3. Answers.
4. Written admissions of the genuineness of papers or documents.
5. Affidavits.
6. Transcripts of evidence in the pending case.
7. Written stipulations of fact. Not only does Section 2311.041 Revised Code enumerate the items which must be in writing, but it provides further that they be filed previous to the hearing on the motion and provides further that "No evidence or stipulation may be considered except as stated in this section" The foregoing enumerated items were not present in this instant case which precluded the Judge from rendering a summary Judgment for defendants, Morris v. First National Bank and Trust Co. 15 Ohio St. 2d 164.

There was nothing claimed in the petition, answer, reply or affidavits of either party that were not disputed by the other party. Therefore, this was not a proper case for summary judgment to be rende d m; for the reason that in the case of Rainey v. Horshbarger 7 Ohio App. 2d 260 on page 265 the court said "on a motion by Defendant for summary judgment *** his affidavit must set forth evidentiary facts showing the sufficiency of his defense. He must make out a clear case on the undisputed material facts presented on the record"; *** In this case, respondents themselves did not file affidavits but their lawyer filed his own which was false in that he did not file in the case at bar, as his affidavit said he did, the folder or the original papers of the case he claimed was res judicata to the case at bar; yet, the trial court judge loved that type of conduct on the part of *Attorney Mueller* for respondents. The affidavits of *Mueller* did not set forth evidentiary facts and their contents would not have been permissable in evidence on the trial, further they were denied by plaintiff's affidavit; that charged *Mueller* among other things with "attempting to convert the sum stated in the petition to his own use; in making false statements in 4(C) of his affidavit; charged that case no. 396399 and 433879 had no bearing on the case at bar.

Paragraphs 11 and 13 or petitioner's affidavit in opposition to the motion for judgment are incorrect for the reason that *Mueller* lied in his affidavit. Paragraph 5 when he stated *** "and in the official file of the court which is submitted by the defendants herein" *** He did not at any time submit or offer said official folders in case no. 433879 to the court in the case at bar; petitioner's affidavit charged that "the Akron Municipal Court did not have on the 23rd. day of February 1967 Jurisdiction to make any lawful findings and orders in its case no. 433879"; and also charged that "*Attorney Mueller* by fraudulent acts and collusion on his part get the honorable *Judge Riddle* to sign a purported order in an effort to defeat other claims against *Mueller* and respondants by this petitioner". The fact that *Mueller* was charged with fraudulent acts, collusion and conversion of funds in petitioner's affidavit in opposition to *Mueller's* affidavit presented a question of fact and respondents' summary judgment should be reversed in light of *Aalyson v. Nationwide Mutual Ins. Co. 1 Ohio App. 2d 192* wherein the court held by reason of the insurance co. adjuster's interference in the case presented a material fact for a jury to determine; which was the same identicle situation as in the case at bar except the interference was by respondents' *Attorney Mueller* which had the same effect on this petitioner as the adjuster's interference had on the plaintiff in the *Aalyson* case.

Petitioner's affidavit also charged the substance contained in the affidavit of *Mueller* was "wholely immaterial, incompetent and has no bearing on the case at bar and is nothing more than conclusions of the pleader." In the case at bar, the courts had only affidavits submitted by counsel for respondents and petitioner from which conflicting inferences can be drawn, in *Bohn Alum. and Brass Corp. v. Storm King Corp. 303 F. 2d 425 at P. 427.* The affidavit of *Storm King* was challenged by *Bohn* the same as *Mueller's* affidavit was challenged on the ground "it contained conclusions of ultimate fact and law" *** and conflicting inferences could be drawn from the affidavits; the western division granted a motion for summary judgment; but the U.S. Court of Appeals Sixth Circuit reversed the judgment by reasons of the conflicting inferences and the affidavits contained conclusions of ultimate facts.

There were many factual issues raised by the petition, answer and reply in the case at bar, and the respondents' motion for summary judgment was sustained without a finding that there were no issues of material facts, hence the record does not present solid basis of finding based on litigation or uncontradicted facts or reviews of appellate courts with respect to legal issues involved, that should preceed review by court of appeals of judgment rendered, hence cause should be remanded that factual situation might be fully developed through usual trial procedure instead of summary judgment proceedings and in the light of *Steiner v Wertheimer 250 F. 2d at P. 574.*

The cause at bar was brought in case no. 396399 and was dismissed without prejudice; case no. 433879 was brought to vacate the dismissal and to reinstate case no. 396399 and in the same petition of case no. 433879 damages were sought for contracts allegedly entered into in 1964 for $1,780. as the appellate court states; however, the appellate court is at error in holding case no. 433879 was contested in the trial court; petitioner received the amount of the alleged damages in case no. 433879 that occurred in 1964 but the judgment did not reinstate case no. 396399 that was for the 1962 contract; subsequently the cause of action that was dismissed without prejudice in case no. 396399 was brought in the court of common pleas case no 265287 which is the case at bar.

The Court of Appeals is at error in holding that *** "as of the date on which the motion for summary judgment was filed, no trial date had been specifically established" for the reason that R.P. 6 and 7 of the record certified to this court clearly show that the trial date was changed from the 20th. day of March 1969 til the 14th. day of April 1969 and that the motion for summary judgment was filed April 11, 1969 without petitioner's consent, which violated the revised code of Ohio Section 2311.041 (A) in that petitioner at no time gave his consent for respondents to file said motion.

Upon the appeal to the Court of Appeals, the Appellate court's opinion and judgment was even more absurd than the trial court's in that the Appellate court departed even further than the trial court did; from the accepted and usual course of judicial proceedings; thereby sanctioning a complete departure

by the trial court and the Appellate court went to cases other than the case at bar and based their opinion on them instead of on the case at bar that they were supposed to be reviewing the trial court's judgment in.

The trial court erroneously found that the cause of action in case no. 433879 was the same identical cause as is the case at bar for the reason that the petitions in each case did not state the same cause of action and the trial court in the case at bar did not at any time have before it the petition or a copy thereof in case no. 433879 that respondents claim is res judicata to the case at bar. Since case no. 433879 was filed in a different suit, it did not constitute a reentrance of appearance back into the dismissed case no. 396399, *Hays v. Kentucky Bank 125 Ohio St. 359.*

The burden of proving that there were no issues of material fact raised by the pleasings was upon respondents *Rukauina v. N.Y. Cent. R. D. Co. 1 Ohio App. 2d 48;* Revised Code of Ohio Sec. 2309.36 nor did they establish on the trial or hearing of their motion their claim of res judicata or any fact conferring the court's jurisdiction in case no. 433879 on the 23rd. day of February 1967, and their judgment should be reversed.

Petitioner raised many material facts in the case at bar by his reply; Ohio Revised Code Section 2311.02 "issues arise on the pleadings where a fact or conclusion of law is maintained by one party and controverted by the other; they are of two kinds: (A) issues of law (B) issues of fact."

Ohio Revised Code 2311.03 "an issue of fact arises: (A) upon a material allegation in the petition denied by the answer; (B) upon a counterclaim or new matter, presented in the answer and denied by the reply; (C) upon material new matter in the reply, which is to be considred as controverted by the adverse party without further pleadings"; petitioner's reply raised material facts both by way of denials and new matter.

In addition to the federal constitutional; revised code of Ohio Sec. 2311.04 reads *** "issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial is waived." *** petitioner did not waive his right to a jury trial in the case at

bar and the trial court could not render the judgment it did for respondents.

The transcript of the docket in case no. 433879 did show that a judgment purportedly was rendered at a time when the court did not have jurisdiction of the case but it did not show the cause of action in that case was for the same thing as is the case at bar. In the case of *Norwood v. McDonald 142 Ohio St. 299* is the well settled rule as to Ohio law on res judicata and estoppel to wit:

1. A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.
2. A judgment or decree in a former action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter.
3. A point or a fact which was actually and directly in issue in a former action and was there passed upon and determined by a court of competent jurisdiction may not be drawn in question in any future action between the same parties or their privies, whether the cause of action in the two actions be identical or different.
4. Where a judgment is relied on by way of evidence as conclusive per se between the parties in a subsequent suit, it must appear by the record of the former suit that the particular controversy sought to be precluded was therein actually or necessarily tried and determined.
5. To render a former judgment an absolute bar to a subsequent suit embracing the same matter in controversy, the former judgment must be specially pleaded and proved. A failure or neglect to so plead and prove such former adjudication constitutes a waiver of the defense of res judicata.
6. While all claims of right embraced in a single cause of action must be prosecuted simultaneously, a litigant

cannot be required to prosecute simultaneously in a single action multiple causes of action, even though they relate to the same subject matter.

7. The rule that a judgment is conclusive, not only as to what was determined in the action but as to all issues which properly might have been determined therein, is limited to cases involving a single cause of action.

A dismissal of an action without prejudice in Municipal Court, does not bar the plaintiff from refiling the same action in the Court of Common Pleas within the statute of limitations.
Wanzer v Self 30 Ohio St. 378
King v. Bishop 44 Ohio St. 225
Ohio revised Code Sec. 2305.06

Where an action filed in a Municipal Court seeks contracts entered into in 1964 contracts, but without reinstating the previous dismissed case; the previous dismissed case on contract between the same parties dated July 12, 1962, can be brought in the Court of Common Pleas within 15 years from the date the obligation under the contract became due.
Ohio revised Code Sec. 2305.06

A journal entry attempting to make new orders in a case; in the Trial Court is void for lack of the court's jurisdiction, where it is signed by attorney for defendants and a judge of the Trial Court only without a hearing and notice to the plaintiff and placed of record in the Trial Court seven months after the action had been appealed to the Court of Appeals and therefrom to the Supreme Court and while the appeals were still pending.
Ohio revised Code Sec. 1901.30. (D) .
Ohio revised Code Sec. 2505.04.
Norwood v. McDonald 142 Ohio St. 299
syllabus 1,2,3,6,7,8 and 9 .
Letter to Hon. Judge Powers, Akron Municipal Court
Sullivan v. Cloud et al., 62 Ohio App. 462.
Hudson v. Robinson 103 Ohio App. 375.

The summary judgment statute is inoperative in cases where a material allegation is maintained in the petition and the answer presents new matter and where the new matter is denied in the reply, since the pleadings themselves present questions of material facts; it is prejudicial error for the courts to apply the cummary judgment statute and deny the parties the right to have their claims determined by a jury.

Plaintiff's reply in this instant case
Ohio revised Code Sec. 2311.02
Ohio revised Code Sec. 2311.03
Ohio revised Code Sec. 2311.04
Ohio revised Code Sec. 2309.36
Ohio revised Code Sec. 2311.041
Somermir v. First National Bank 170 Ohio App. 2D 136
Manette v. Metropolitan Life Insurance Co. 94 Ohio App. 399
Slick Airways v. Reinert 114 Ohio App. 124
Bowen Aluminum v. Storm King 303 Fed. 2D 425.

Common Pleas Courts are without jurisdiction on the day a case reaches it for trial to grant leave to file a motion for summary judgment in the action; since the only period of time during the pendency of an action that is discretionary with the court to grant leave to file a motion for summary judgment is during the time from which the action has been set for pretrial up to the pre-trial hearing only. And a bill of exceptions is not mandatory to prosecute error on appeal where the record clearly shows that such leave of Court was granted on the day the case reached the courtroom for trail: and where it is admitted by counsel on hearing their motion that it was filed with both verbal and written leave of Court granted on the day the case had reached the Courtroom for trail. R.P. 6,7 and 8. This Court has never before decided this question before in any case and it ought to be settled.
Ohio Revised Code Sec. 2311.041 (A)

This instant cause of action has at no time ever had a judgment rendered on it by any court and the law and this court will not allow the respondants to receive full benefits under the contract and escape their liability to pay the sum that

they agreed to pay in the contract
Jensen v. Republic Steel 32 Ohio law ABS 29
Fifth-Third union Trust Company v. Cist 105 Fed. 2D. 282
Gibbons v. Schriring Realty Co., 25 Ohio law ABS 260
Starr Co. v. Columba Brd. System, 36 NE 2D 861
City of Cincinnati v. Directors et al., 71 Ohio St. 500
Tilletson et al v. Scottdale 23 Ohio APP. 399
Heller v. Standard Acci, Ins. Co. 161 NE 360
Valley Elec. Co. v. City of Toledo 273 U.S. 7 7

In passing on this appeal it was prejudicial error and contrary to law for the Court of Appeals to say ••• "in the absence of any evidence to the contrary, it is presumed that the action of the court, in granting the continuance, was for good cause and not an abuse of discretion. As of the date on which the motion for summary judgment was filed, no trial date had been specifically established therefore, the filing of such a motion was proper." When in truth and in fact if the court would have looked to the original papers and the bill of exceptions in this case that was properly before the court instead of to all, of the other cases it dug up and brought into it's opinion they would have seen that the continuance was granted on the day the case reached the courtroom for trial on March 20, 1969; for the sole purpose of giving counsel for defendants an opportunity to file their motion for summary judgment and the court instructed them to file the motion on April 4, 1969 since on March 20, 1969, the court continued the matter till April 14, 1969 and the record clearly shows these facts as well as; counsel for defendants admitted these same facts at the hearing of the motion in the bill of exceptions on pages 6,7,8,9,10 and 11;

Nor shall the Appellate Court state in its purported opinion in this matter ••• "the finding of the trial court that the claim set forth in the petition had been previously adjudicated and that the judgment rendered in the Akron Municipal Court, in favor of the Plaintiff (Cochran) on the claim, had been paid in full, comports with the finding of this court in Case No. 6163." How can a finding in Case No. 6163 have any bearing on this instant action? When the cause of

action in the Case No. 6163 is for the last portion and this Case No. 6662 is for the first portion of a written divisible contract dated July 12, 1962 and the Akron Municipal Court Case No. 433879 was for written and oral contracts that were entered into during 1964 between the parties therein.

Petitioner's must pay for the roughin portion of the two room addition they received under the contract;

Bolds v. Smith 114 O APP 21
Horvath v. Fisher Foods, 26 O OPS 2D 113
Rainey v. Hershburger 70) APP 2D 260
Hamlin v. McAlpine Co. 175 Ohio St. 517
Presta v. State Foundry Co. 172 Ohio St. 28
Petroff v. Comm. Freight 82 Ohio Law ABS 433
Ohio Revised Code Sec. 2311.041
Rossen v. Hochwalt, 12 Ohio APP 2D 129.
21 Ohio Jurisprudence 2D, Evidence Sec. 60.

CONFLICT

The Court of Appeals has rendered a decision in conflict with decisions of other courts of appeals on the same matter to wit: In the Rainey case 7 Ohio App. 2d 360 on P. 361 the court said "In her reply plaintiff denies ••• the duty to make a response does not arise until and unless the motion is supported by documents as provided by that section, showing prima facie that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law ••• one not responding does in no manner lessen the defendant's duties as set forth in 49 Corpus Juris Secundum 418, Judgments, section 225 B: on a motion by defendant for summary judgment dismissing the complaint his affidavit must set forth evidentiary facts showing the sufficiency of his defense. He must make out a clear case on undisputed material facts presented on the record in the case •••". See also, Corpus Juris, Secundum 420, Judgments Section 225 C. The principle of law has been followed in all cases on summary judgments in Ohio which number in the thousands, except in the case at bar and the lower courts have refused to follow the usual course of judicial procedure in it.

The Court of Appeals of Hancock County, Ohio find

prejudicial error in the Common Pleas Court in the Rainey case and reversed the summary judgment; yet, the Summit County Court of Appeals in the case at bar and on the same circumstances pretended to find no error prejudicial to petitioner which is in conflict with the Rainey case, the Morris case *supra* and thousands of other cases.

The doctrine of res judicata applies only to an adverary proceedings and only when the same issues and the same parties or their privies are involved.

The State of Ohio Supreme Court's order dismissing the appeal as of right "For the reason that no substantial constitutional question exists herein" and its order overruling petitioner's motion for rehearing was erroneous in light of the many constitutional questions raised in the law as set out *supra* and was a complete departure from the accepted and usual proceedings and sanctioned a departure by both the Court of Appeals and the trial court so far as to call for an exercise of this court's power of supervision, expecially since there are five other cases pending in some of the lower courts that are sure to reach this court for the reason that said lower courts have in some way given the petitioner the same shabby treatment as they gave him in the case at bar.

No better statement depicts and supports petitioner's position than that contained in the Norwood case P. 299-300 and the Morris case P. 154-155 *supra*.

CONCLUSIONS

For the foregoing reasons, we submit that the decisions of the lower courts have failed to accept and apply the principles established by this court and all courts in Ohio including previous decisions of their own that are still standing and are appliable law on summary judgment procedure. The prounouncement by the lower courts, in departing from the fundamental principles, if permitted to stand, will lay the cornerstone for the beginning of the end of the rights of every citizen to his day in court, their right to trial by jury in civil cases for amounts over $20., the right to have and own contracts, to enjoy contracts whereby no state shall pass any law impairing the obligations of contracts and will mean the loss

of the five other pending cases wherein the lower courts are denying the petitioner his day in court.

Since the issues here presented are so prevalent in other cases throughout the United States and therefore of great public interest and importance, we believe that it is of sufficient weight as to merit the attention of this court. We urge this court to note probable jurisdiction and to grant this petition for writs of certiorari.

Respectfully submitted
Virgil E. Cochran
In propria persona
3720 Alberta Drive
Norton, Ohio 44203

APPENDIX

Filed in the Akron Municipal Court February 8, 1967

Virgil E. Cochran
3720 Alberta Dr.
Barberton, Ohio

The Honorable Judge Thomas M. Powers
166 South High Street
Akron, Ohio 44308

February 2, 1967

Dear Honorable Sir:

This letter is to inform you that a Motion in Case No. 433879 titled Virgil E. Cochran vs. Robert G. Costin et al. has been set for a hearing in your Court on February 15, 1967 and I wish to further bring to your attention that this case is being appealed from the Court of Appeals on into the Supreme Court of the State of Ohio so you may govern your Court accordingly.

Sincerely yours,

Virgil E. Cochran

CC: Mailed to
Joseph P. Mueller and
James C. Seminaroti

JOURNAL ENTRY IN THE COURT OF COMMON PLEAS OF SUMMIT COUNTY, OHIO.
(Filed October 23, 1967.)

This cause came on to be heard by the Court upon the Demurrer of the Defendants to the Petition of the Plaintiff filed herein. And the Court, after consideration of the Demurrer together with the arguments of counsel, for the Defendants and of Plaintiff on his behalf, the briefs of both parties filed herein, finds the Demurrer of the Defendants is not well taken and the same should be, and is hereby overruled.

JOURNAL ENTRY IN THE COURT OF COMMON PLEAS OF SUMMIT COUNTY, OHIO.
(Filed April 11, 1969.)

"On oral motion of the Defendants and each of them, and so that they can comply with a prior verbal directive of this Court, the Court being fully advised in the premises, the Defendants and each of them are hereby granted leave to file their motion for summary judgment in the within matter instanter."

FINDING IN THE COURT OF COMMON PLEAS OF SUMMIT COUNTY, OHIO.
(Filed September 28, 1970.)

This matter came on to be heard on defendant's motion for a summary judgment. The plaintiff objects to the hearing of this motion because of Section 2311.041 A which states that after the action has been set for trial motion for judgment may only be filed with consent of all the parties to the action.

The Court finds that although the case had been set for trial, the case was thereafter postponed to a later date and as of April 11, 1969, which was the date of filing defendant's notices, no trial date had been specifically established.

The Court further finds that Rule 12(C) provides that such motion may be filed at any time so as not to delay trial after the pleadings are closed. The Court finds that this new rule which took effect July 1, 1970, takes priority over the previous statute, but in any event the statute itself was not violated.

The Court further finds the motion was filed with the leave of Court.

Coming now to the motion for judgment, the Court finds that the claim set forth in the petition is on a contract dated July 12, 1962. The Court finds that the identical claim is set forth in Cases Numbered 396399 and 433879 of the Municipal Court of Akron and that said claim has been duly adjudicated by journal entry in case number 433879 of the Municipal Court of Akron, that judgment was rendered for plaintiff in a latter case in the amount of $1,780.00 and that judgment was paid and satisfied in full.

The Court does not find on the papers and transcript filed from the Akron Municipal Court a record of such payment, but the affidavit of Attorney Mueller states that such sum was paid and there is no affidavit to contradict that.

The Court finds therefore that the matters claimed in plaintiff's petition in this case, that is Common Pleas Number 265187, have been completely adjudicated and judgment paid in full. There is, therefore, nothing further to be determined in this case and summary judgment is rendered in favor of the defendants and against the plaintiff.

Exceptions granted.

Defendant's attorney shall furnish journal entry and submit same to the plaintiff for signature before filing. If plaintiff refuses to approve the entry, the defendant shall give three days notice to the plaintiff as to the date of presentation of such entry to this Court and shall then present same to the Court for signature.

Costs shall be assessed against the plaintiff.

Evan J. Reed, Judge

JUDGMENT ENTRY IN THE COMMON PLEAS COURT OF SUMMIT COUNTY, OHIO
(Filed October 5, 1970)

This matter came on to be heard on Defendant's motion for summary judgment and the objection of the Plaintiff to the hearing of said motion on the ground that Section 2311.041 A, Revised Code, was violated herein for the reason that such a

motion may be filed only with consent of all parties once an action has been set for trial.

The Court finds that although the within action had been set for trial, the trial was thereafter postponed to a later date, and on the date of the Defendant's motion, to-wit: April 11, 1969, no trial date had been specifically established.

The Court further finds that Rule 12(C), Civil Rules of Practice, provides for the filing of such a motion at any time so long as such filing does not delay trial once the pleadings are closed, that the said Rule 12(C) went into effect July 1, 1970, that the said Rule 12(C) takes priority over the statute aforesaid, and that in any event said statute has not in fact been violated herein.

The Court finds further that the within motion was filed by the Defendant with leave of the Court.

Coming now to the Defendant's motion for summary judgment, the Court finds that the claim set forth in the petition of the Plaintiff is on a contract dated July 12, 1962, that the identical claim is set forth in Cases Numbered 396399 and 433879 of the Municipal Court of Akron, and that said claim has been duly adjudicated by journal entry in case number 433879 of the said Municipal Court of Akron, that judgment was rendered for the plaintiff in the latter case in the amount of $1,700.00, and that said judgment was paid and satisfied in full.

The Court does not find on the papers and transcript filed from the said Akron Municipal Court a record of such payment, but the affidavit of Attorney Joseph P. Mueller states that such sum was paid and there is no affidavit to contradict such statement.

The Court therefore finds that the matters claimed in Plaintiff's petition in the within cause, that is in Cause Number 265187 in the Court of Common Pleas, have been completely adjudicated and judgment paid in full, so that there is nothing further to be determined in this case and summary judgment should be, and it hereby is, rendered in favor of the Defendants and against the Plaintiff.

Plaintiff is granted his exceptions, and Plaintiff shall pay the costs herein. It is so ORDERED, ADJUDGED and DECREED.

OPINION OF THE COURT OF APPEALS OF SUMMIT COUNTY, OHIO

(Argued March 24, 1971.)
(Decided April 21, 1971.)

VICTOR, J.

In 1962, plaintiff, Virgil E. Cochran (appellant herein), filed an action in the Akron Municipal Court (No. 396399), against the defendants, Costill, on a written contract wherein he agreed to build an addition to the Costill home. The written contract called for a "complete price of $3000.00; ½ payable when the work is roughed in and the balance on the completion of the job." The amount sued for was $1500 for the "roughed in" portion of the work. That case was dismissed. Appeal was taken to this Court (case No. 5550) and subsequently dismissed.

Thereafter, Cochran filed another action in the Akron Municipal Court (No. 433879) against the same defendants, and Joseph Mueller, their attorney, to vacate the dismissal and to reinstate case No. 396399, and to award Cochran a judgment in the amount of $1780, and costs.

Case No. 433879 was contested in the trial court, and, after an appeal to this court (case No. 5851), and a remand to the Akron Municipal Court, a judgment was rendered on behalf of Cochran for the sum of $1780, and costs.

However, before the judgment fo $1780 was rendered in Akron Municipal Court, Cochran filed suit in the Court of Common Pleas of Summit County (case No. 261953), seeking to recover, from the Costills, money claimed due under two alleged separate contracts; one in writing and the other oral. In this case, Cochran alleges that he entered into these contracts with the Costills for labor and materials used to improve the home in which the Costills live (the same home referred to in the other two cases). In the course of one of the hearings on one of many motions filed in this case, Cochran said, in referring to the judgment rendered in case No. 433879 of the Akron Municipal Court, that he had received the amount of that judgment. Summary judgment was rendered against Cochran. From that order, he appealed to this court (case No. 6163).

This court held:

"It is thus apparent that Cochran brought an action on the written contract for that portion of the money due for the roughed-in part of the addition to the house and he has received his money for such work. He now says that the trial court was in error in rendering a summary judgment against him in the instant case, since he has sued for the second-half of the work, and for additional work done under an oral contract which was a separate and distinct cause of action.

"As to the cause of action for the work done under the oral contract, we think the trial court was in error for rendering a summary judgment against Cochran. That matter had not been heard or otherwise disposed of in the action numbered 433879 in the Akron Municipal Court. To dismiss that cause of action is contrary to law.

"Our next problem concerns the cause of action based upon the claims arising out of the written contract. Is this contract divisible? *** Has the plaintiff, by filing his action in the Akron Municipal Court, waived the right to proceed in the Common Pleas Court on a written contract? *** (Emphasis supplied).

Holding that the contract was divisible and not entire, this court reversed the judgment, saying:

"It is admitted that the Costills are living in their house and the addition thereto built by Cochran. They had been sued for the roughed-in work and have paid for it. Whether there is a defense to the claim for the balance due, we do not know, but, at least, that claim has not been adjudicated largely because of a technicality of interpretation. Under the circumstances herein, we believe that the trial court was in error when it concluded that this contract was entire. The granting of summary judgment is reversed as contrary to law, and the cause is reversed and remanded to the trial court for further proceedings not inconsistent with this opinion." (Emphasis supplied).

That case is still pending.

Prior to the decision of this court in case No. 6163, Cochran filed another action in the Court of Common Pleas of Summit County (case No. 265187) against the Costills for $1500 for the "roughed in" portion of this same contract. This case was duly set for trial and then continued, after which the defendants filed a motion for summary judgment, which was granted by the trial court. That court found that "the matters claimed in plaintiff's petition in the within cause (case No. 265187) have been completely adjudicated and paid in full so that there is nothing further to be determined in this case and summary judgment should be, and it hereby is, rendered in favor of defendants and against the plaintiff."

It is from this judgment that Cochran appeals, setting forth eleven grounds of error. In substance, Cochran contends that the court erred in granting the Costills a continuance once the case had been set for trial and, thereafter, permitting them to file a motion for summary judgment without his consent. Revised Code 2311.041 (A).

We have examined collectively all of the errors claimed, in the light of the record before us, and we find none prejudicial to the rights of Cochran.

In the absence of any evidence to the contrary, it is presumed that the action of the court, in granting the continuance, was for good cause and not an abuse of discretion. As of the date on which the motion for summary judgment was filed, no trial date had been specifically established. Therefore, the filing of such a motion was proper.

The finding of the trial court that the claim set forth in the petition had been previously adjudicated, and that the judgment rendered in the Akron Municipal Court, in favor of the plaintiff (Cochran) on that claim, had been paid in full, comports with the finding of this court in case No. 6163.

Finding no error prejudicial to the appellant, Cochran, the judgment is affirmed.

Judgment affirmed.

DOYLE, P.J., and BRENNEMAN, J., concur.

JOURNAL ENTRY IN THE COURT OF APPEALS OF SUMMIT COUNTY, OHIO
(Filed May 4, 1971.)

This cause came on to be heard upon the notice of appeal on questions of law of the said Virgil E. Cochran, Appellant herein, together with a transcript of the docket or journal entries of the the Common Pleas Court of Summit County and the Municipal Court of Akron and such original papers, or transcripts thereof, as were necessary for said appeal, filed therewith in the said cause the said Virgil E. Cochran, wherein the said Virgil E. Cochran was Plaintiff and Robert G. Costill and Mildred W. Costill, his wife were Defendants mentioned and referred to in said notice of appeal, and was argued by counsel for appellees, and by appellant, and submitted to the Court.

Upon consideration whereof, the Court finds that there is no error, prejudicial to Appellant, manifest upon the face of the record in said orders and judgment of said Court of Common Pleas and, in its opinion, substantial justice has been done to the party complaining, as shown by the record of the proceedings, and the judgment under review.

It is thereupon considered, ordered and adjudged by this Court, that the judgment and proceedings of the said Common Pleas Court in favor of the said Appellee against the Appellant, be, and the same are hereby, in all things affirmed; there being, in the opinion of the Court, reasonable ground for this proceeding.

It is further ordered that a special mandate be sent to the to carry this judgment into execution.

Exceptions to appellant.

and, in its opinion, substantial justice has been done to the party complaining, as shown by the record of the proceedings.

JOURNAL ENTRY IN THE COURT OF APPEALS OF SUMMIT COUNTY, OHIO
(Filed June 14, 1971.)

Virgil E. Cochran, plaintiff (appellant), has filed a motion "for an order determining whether or not there is a conflict between the final order of judgment upon which this court has unanimously agreed on in this case on May 4, 1971, conflicts with judgments pronounced upon the same question by other courts of appeals of other appellate districts of the state of Ohio ...."

The court finds that no conflict exists, and, further, that no hearing is required to make such a determination.

It is, therefore, ordered that said motion be, and it hereby is, denied.

Exceptions to plaintiff (appellant).

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY
September 22, 1971

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL AS OF RIGHT
September 22, 1971

This cause, here on appeal as of right from the Court of _____ County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING
November 3, 1971

It is ordered by the court that rehearing in this case is denied.